

Model Annotated Individual Plea Agreement
Last Updated October 8, 2008

UNITED STATES DISTRICT COURT

[XXXX] DISTRICT OF [XXXXXX]

UNITED STATES OF AMERICA)	
)	Criminal No. [XXXX]
v.)	
)	Filed
[JOHN R. DOE],)	
)	Violation:
Defendant.)	
_____)	

PLEA AGREEMENT¹

The United States of America and [John R. Doe] (“defendant”) hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B OR C) of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;

¹ *This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney’s Office in the district where the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division’s model plea agreements are available at <http://www.usdoj.gov/atr/public/criminal.htm>.*

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

(c) as a citizen and resident of [COUNTRY], to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXX] District of [XXXX];]

(d) to plead not guilty to any criminal charge brought against him;

(e) to have a trial by jury, at which he would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;

(f) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

(g) not to be compelled to incriminate himself;

(h) to appeal his conviction, if he is found guilty; and

(i) to appeal the imposition of sentence against him.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(h) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXXXX] District of [XXXXXX]]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is

consistent with or below the recommended sentence² in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)[*for C agreements only, also insert “-c)”*]. Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct.³ Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information[in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere] [TIME FRAME FROM CHARGING PARAGRAPH OF THE INFORMATION] in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below. [The United States agrees that at the arraignment, it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing

² *If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.*

³ *Plea agreements may also include following stipulation: “The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.”*

hearing in this case.^{4]}

FACTUAL BASIS FOR OFFENSE CHARGED⁵

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:⁶

(a) For purposes of this Plea Agreement, the “relevant period” is that period [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was [POSITION] of [CORPORATE EMPLOYER], an entity organized and existing under the laws of [STATE *OR if foreign*-- COUNTRY] and with its principal place of business in [CITY, STATE *OR if foreign* -- CITY, COUNTRY]. During the relevant period, [CORPORATE EMPLOYER] was a

⁴ *The Antitrust Division will follow local practice regarding the release of the defendant on his own recognizance. Personal recognizance bonds may be appropriate in some cases.*

⁵ *A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the decision in United States v. Booker, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore, facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than \$350,000 for a pre-June 22, 2004 Sherman Act conspiracy or above \$1 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(b). For a discussion of the implications of Booker on Division charging and plea agreement practice, see Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>].*

⁶ *The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.*

[producer] of [PRODUCT] and was engaged in the sale of [PRODUCT] in [the United States and elsewhere]. [SHORT PRODUCT DESCRIPTION.] [During the relevant period, [CORPORATE EMPLOYER]'s sales of [PRODUCT] affecting U.S. customers totaled at least \$[AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES FINE AND IMPRISONMENT RANGES].]

(b) During the relevant period, the defendant participated in a conspiracy with other persons and entities engaged in the [manufacture and sale] of [PRODUCT], the primary purpose of which was to [DESCRIPTION OF THE CHARGE] sold in [the United States and elsewhere]. In furtherance of the conspiracy, the defendant engaged in conversations and attended meetings with representatives of other major [PRODUCT] [producing] firms. During such meetings and conversations, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. [The defendant was an [organizer or leader/manager or supervisor] in the conspiracy[, which involved at least five participants/was extensive].] [The defendant significantly facilitated the [commission/concealment] of the conspiracy by his abuse of his position of trust.] [During the investigation of the conspiracy, the defendant [willfully obstructed or impeded/attempted to obstruct or impede] the investigation.]

(c) *[Description of relevant interstate and foreign commerce. Common description is as follows --* During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate

[and foreign]commerce.] The business activities of [CORPORATE EMPLOYER] and co-conspirators in connection with the [production and sale] of [PRODUCT] affected by this conspiracy were within the flow of, and substantially affected, interstate [and foreign]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXXX] District of [XXXXXX], [XXXX] Division. [*Description of relevant venue. Common descriptions are as follows--* [The conspiratorial meetings and conversations described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by the defendant] occurred in this District.] *OR* [[PRODUCT] affected by this conspiracy was sold by one or more of the conspirators to customers in this District.]]

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Antitrust Act is:

- (a) a term of imprisonment for [three (3)]⁷ years (15 U.S.C. § 1);
 - (b) a fine in an amount equal to the greatest of (1) [\$350,000],⁸
- (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice

⁷ *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum jail term would be 10 years.*

⁸ *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum fine under Sherman Act would be \$1 million rather than \$350,000.*

the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of [one (1)]⁹ year following any term of imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for [the entire term of supervised release]¹⁰ (18 U.S.C. § 3559(a)[(5)]¹¹; 18 U.S.C. § 3583(b)[(3)]¹² and (e)(3); and United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”) §5D1.2(a)[(3)]¹³).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. §5E1.1, the Court may order¹⁴ him to pay restitution to the victims of the offense; and

⁹ Note if the defendant is pleading guilty to an antitrust conspiracy that continued on or after June 22, 2004 such that the maximum jail term is 10 years, the offense will become a Class C felony under 18 U.S.C. § 3559(a)(3) and will carry a maximum term of supervised release of 3 years under 18 U.S.C. § 3583(b)(2) and U.S.S.G. §5D1.2(a)(2).

¹⁰ For antitrust offenses committed on or after June 22, 2004, applicable language is “up to two (2) years”.

¹¹ Cite 3559(a)(3) for antitrust offenses committed on or after June 22, 2004.

¹² Cite 3583(b)(2) for antitrust offenses committed on or after June 22, 2004.

¹³ Cite 5D1.2(a)(2) for antitrust offenses committed on or after June 22, 2004.

¹⁴ In an antitrust case against an individual, restitution may be ordered under 18 U.S.C. § 3583(d) as a condition of supervised release or under 18 U.S.C. § 3663(a)(3) to the extent agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a \$100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES¹⁵

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,¹⁶ along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent

¹⁵ *Guidelines calculations may be included in the Plea Agreement.*

¹⁶ *While it is the norm to apply the Guidelines Manual in effect at sentencing, U.S.S.G. §1B1.11(b)(1) provides that if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used. However, now that the Guidelines are advisory, some courts have questioned whether the ex post facto clause applies to advisory guidelines. See e.g., United States v. DeMaree, 459 F.3d 791 (7th Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines); see also United States v. Andrews, 532 F.3d 900, 909 (D.C. Cir. 2008) (collecting cases). The Division reserves the right to argue that notwithstanding any potential ex post facto issue, that the court should nevertheless apply the current version of the Guidelines Manual.*

provided in U.S.S.G. §1B1.8(b).]¹⁷

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B OR C), [*if a B agreement--*the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] OR [*if a C agreement--* the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,] a sentence [within the applicable Guidelines range]¹⁸ requiring the defendant to pay to the United States a criminal fine of \$[XXXXXX][, pursuant to 18 U.S.C. § 3571(d)¹⁹,] [payable in full before the fifteenth (15th) day after the date of judgment] OR [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] OR [without interest pursuant to 18

¹⁷ A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.

¹⁸ This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.

¹⁹ Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at recommended fine greater than the Sherman Act maximum.

U.S.C. § 3612(f)(3)(A) OR § 3612(h)]]²⁰; [a period of incarceration of XXXX months/years;]²¹
[and no period of supervised release]²² [and restitution of \$XXX pursuant to 18 U.S.C. §
[3583(d)/3663(a)(3)]²³ [payable in full before [DATE]] OR [payable in installments as set forth
below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] OR [without interest pursuant to
18 U.S.C. § 3612(f)(3)(A) OR § 3612(h)]] (“the recommended sentence”)²⁴. [The United States

²⁰ The time for payment should be specified using one of these options. For an installment schedule to be imposed on an individual defendant, there must be a finding that installment payments are “in the interest of justice” under 18 U.S.C. § 3572(d)(1); for example, if a lump sum payment would have an unduly severe impact on the defendant or his dependents. See U.S.S.G. §5E1.2(f). If the defendant requests, and the staff agrees, that the fine may be paid in installments, a paragraph such as Paragraph 8(a) setting forth the recommended installment schedule should also be included. Note that if any fine or restitution greater than \$2,500 is not paid in full before the 15th day after the date of judgment, the payment of interest is required pursuant to 18 U.S.C. § 3612(f)(1) unless the defendant does not have the ability to pay interest, in which case, the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f)(3)(A) or § 3612(h).

²¹ The Antitrust Division will not agree to a “no jail” sentence for an individual defendant and the Division’s practice is not to remain silent if a defendant argues for no jail at sentencing. The Division seeks to prosecute and obtain jail time for some or all of the culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant. See Speech by Scott D. Hammond Before the ABA Criminal Justice Section’s Twentieth Annual National Institute on White Collar Crime, Charting New Waters in International Cartel Prosecutions (March 2, 2006), available at <http://www.usdoj.gov/atr/public/speeches/214861.htm>.

²² The Division usually does not seek supervised release when the defendant is a foreign national and will return to his country after completing the jail sentence.

²³ See footnote 14 above. It is extremely rare to have restitution included as part of a plea agreement in an antitrust case, especially one with an individual defendant, as civil suits are normally filed by victims to recover damages. See U.S.S.G. §5E1.1 and optional Paragraph 13 in the Model Corporate Plea Agreement.

²⁴ The recommended sentence is not required to be a specific number of months or years of incarceration or a specific dollar amount for the fine; the Plea Agreement may recommend a sentence within a certain Guidelines range.

will not object to the defendant's request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp (if possible at [CITY], [STATE]) to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date on or after [MONTH DAY, YEAR].]²⁵ The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.²⁶ The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that [the recommended sentence] set forth in this Plea Agreement is reasonable.

[(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §5E1.2(f)], that the fine be paid in the following installments: within [XX] days of imposition of sentence — \$[XXXX] [(plus any accrued interest)]; at ninety (90) days after the imposition of sentence--

²⁵ *This sentence regarding the place of incarceration applies only when the defendant requests, and the Division agrees with, such a provision. The Court's or Bureau of Prison's refusal to grant such a request will not void the Plea Agreement, and thus, if such a request is included in the Plea Agreement, language such as "Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence" should be added to the end of Paragraph 11(a).*

²⁶ *This language refers to the inapplicability of U.S.S.G. §5K2.0 "out of the heartland" departures, while the next sentence allows for a substantial assistance or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.*

\$[XXXX] [(plus any accrued interest)]; at one hundred and eighty (180) days after the imposition of sentence -- \$[XXXX] [(plus any accrued interest)]; at two hundred and seventy (270) days after imposition of sentence -- \$[XXXX] [(plus any accrued interest)]; and at the one-year anniversary of the imposition of sentence— \$[XXXX] [(plus any accrued interest)]; provided, however, that the defendant shall have the option at any time before the one-year anniversary of prepaying the remaining balance [(plus any accrued interest) then owing on the fine].²⁷

[(b)]²⁸ The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of [INSERT RECOMMENDED FINE], pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives his rights to contest this calculation.]

(c) The defendant understands that the Court will order him to pay a \$100 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.

9.²⁹ [The United States and the defendant agree that the applicable

²⁷ *The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case. Note that U.S.S.G. §5E1.2(f) and 18 U.S.C. § 3561(c)(1) provide that the length of the installment schedule for individual defendants generally should not exceed twelve months and shall not exceed five years.*

²⁸ *Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).*

²⁹ *If the recommended sentence for either the fine or incarceration is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay*

Guidelines [fine and incarceration] range[s] exceed the [fine and term of imprisonment] contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §5K1.1, for a downward departure from the Guidelines [fine and incarceration] range(s) in this case and will request that the Court impose the [fine and term of imprisonment]³⁰

determination.

³⁰ *Most Division substantial assistance agreements contain a recommendation for a specific reduced fine and jail sentence. However, it is not uncommon for Division plea agreements, especially agreements with individuals, to contain a recommendation for a “freefall departure,” in which both the Division and defendant are free to argue for the appropriate amount of a departure. Because there is no agreed-upon departure amount, a freefall agreement is more common in B agreements and cases where sentencing is deferred until the defendant’s cooperation is complete. The typical freefall B agreement language is as follows: “If the United States determines that the defendant has provided substantial assistance in any investigations or prosecutions, and has otherwise fully complied with all of the terms of this Plea Agreement, it will file a motion, pursuant to USSG §5K1.1, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the factors set forth in USSG §5K1.1(a)(1)-(5). The defendant acknowledges that the decision whether he has provided substantial assistance in any investigations or prosecutions and has otherwise complied with the terms of this Plea Agreement is within the sole discretion of the United States. It is understood that, should the United States determine that the defendant has not provided substantial assistance in any investigations or prosecutions, or should the United States determine that the defendant has violated any provision of this Plea Agreement, such a determination will release the United States from any obligation to file a motion pursuant to USSG §5K1.1, but will not entitle the defendant to withdraw his guilty plea once it has been entered. The defendant further understands that, whether or not the United States files a motion pursuant to USSG §5K1.1, the sentence to be imposed on him remains within the sole discretion of the sentencing judge.” A separate paragraph usually precedes the freefall paragraph and provides as follows to ensure that the U.S. has the ability to recommend any specific sentence: “The defendant understands that the sentence to be imposed on him is within the sole discretion of the sentencing judge. The United States cannot and does not make any promises or representations as to what sentence he will receive, and is free to recommend any specific sentence to the Court. However, the United States will inform the Probation Office and the Court of (a) this Agreement; (b) the nature and extent of the defendant’s activities with respect to this case and all other activities of the defendant which the United States deems relevant to*

contained in the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] *OR*

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and the defendant further agree that the recommended fine set out in Paragraph 8 above is appropriate, pursuant to U.S.S.G. §5E1.2(e)[and 18 U.S.C. § 3572(b)]³¹, due to the inability of the defendant to pay a fine greater than that recommended.]

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 12 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and his commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. [To enable the Court to have the benefit of all relevant sentencing information, the United States may request, and the defendant will not

sentencing; and (c) the nature and extent of the defendant's cooperation with the United States. In so doing, the United States may use any information it deems relevant, including information provided by the defendant both prior and subsequent to the signing of this Agreement. The United States reserves the right to make any statement to the Court or the Probation Office concerning the nature of the criminal violation charged in the attached Information, the participation of the defendant therein, and any other facts or circumstances that it deems relevant. The United States also reserves the right to comment on or to correct any representation made by or on behalf of the defendant, and to supply any other information that the Court may require."

³¹ Insert "and 18 U.S.C. § 3572(b)" if restitution will be ordered pursuant to 18 U.S.C. § 3583(d), 3663(a)(3), or pursuant to 3663A(c)(1)(A)(ii) in a fraud case, and a Guidelines fine would impair the ability of the defendant to make restitution.

oppose, that sentencing be postponed until his cooperation is complete.]

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence³² provided for in Paragraph 8 of this Plea Agreement. [*If a B agreement*--The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose a sentence consistent with the recommended sentence³³ contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.]

[*Insert (a) and (b) only for C agreements*--(a)If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void. [Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence.]³⁴

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw his guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an

³² *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to “the recommended sentence” here, it is more appropriate to refer to “either party’s sentencing recommendation.”*

³³ *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to “the recommended sentence” here, it is more appropriate to refer to “either party’s sentencing recommendation.”*

³⁴ *Insert this sentence if Paragraph 8 of the Plea Agreement includes a request by the defendant for a certain prison facility.*

attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 13 below, shall be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater. [*For foreign national defendants residing abroad*---For a period of three (3) consecutive days following such a withdrawal of the guilty plea under this subparagraph, the United States shall take no action, based upon either a Relevant Offense or any actual or alleged violation of the Plea Agreement, to revoke the defendant's release on his personal recognizance, to subject the defendant to service of process, arrest, or detention, or to prevent the defendant from departing the United States.]]

DEFENDANT'S COOPERATION

12. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT]³⁵, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall

³⁵ *If the investigation involves a domestic conspiracy, this description in the cooperation provision will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]" The nonprosecution provision will be similarly limited.*

include, but not be limited to:

- (a) producing [in the United States and at other mutually agreed-upon locations] all non-privileged³⁶ documents, including claimed personal documents, and other materials, wherever located,³⁷ in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;
- (b) making himself available for interviews [in the United States and at other mutually agreed-upon locations], not at the expense of the United States, upon the request of attorneys and agents of the United States;
- (c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

³⁶ *Prosecutors may not request that a defendant disclose privileged attorney-client communications or attorney work product, unless the crime-fraud exception applies or the advice of counsel defense is asserted. Of course, defendants are free to waive the attorney-client privilege or work product privilege and produce communications and documents protected by such privileges if they voluntarily choose to do so, but prosecutors may not request that they do so. See Principles of Federal Prosecution of Business Organizations, U.S.A.M. §§ 9-28.710 - 9.28.720, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.710.*

³⁷ *The defendant's obligation to produce responsive documents in his possession, custody, or control wherever located applies to plea agreements in both domestic and international cases. See Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13th Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.*

(d) otherwise voluntarily providing the United States with any non-privileged³⁸ material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding; and

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings[in the United States], fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*).

GOVERNMENT'S AGREEMENT

13. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]³⁹ ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

³⁸ See Footnote 36 above.

³⁹ *If the investigation involves a domestic conspiracy, the nonprosecution provision normally will be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."*

[14.⁴⁰ The United States agrees that when the defendant travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject the defendant to arrest, detention, or service of process, or to prevent the defendant from departing the United States. This paragraph does not apply to the defendant's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401 - 402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[15.⁴¹ (a) Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under Sections 238 and 240 of the Immigration and Nationality Act, 8 U.S.C. §§ 1228 and 1229a, based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove

⁴⁰ *Insert Paragraphs 14 and 15 if defendant is a foreign national. See "Negotiating The Waters" at § II(G), p. 8-9 for a discussion of Division policy regarding the safe passage provision in Paragraph 14.*

⁴¹ *See "Negotiating The Waters at § IV(B), p. 14-17 for a discussion of the Division's policy regarding immigration relief. Note this language has been updated since the time of "Negotiating the Waters" due to creation of the Department of Homeland Security.*

the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2), 8 U.S.C. § 1229a(e)(2)).

(b) The Antitrust Division of the United States Department of Justice has consulted with United States Immigration and Customs Enforcement (“ICE”) on behalf of the United States Department of Homeland Security (“DHS”). ICE, on behalf of DHS and in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant. The Secretary of DHS has delegated to ICE the authority to enter this agreement on behalf of DHS.

(c) So that the defendant will be able to obtain any nonimmigrant visa that he may need to travel to the United States, DHS and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the defendant’s inadmissibility. This waiver will remain in effect so long as this agreement not to seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant’s application for a nonimmigrant visa on the basis of the defendant’s guilty plea and conviction in this case, and DHS will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case.

(d) This agreement not to seek to remove the defendant will remain in effect so long as the defendant:

(i) acts and has acted consistently with his cooperation

obligations under this Plea Agreement;

(ii) is not convicted of any felony under the laws of the United States or any state, other than the conviction resulting from the defendant's guilty plea under this Plea Agreement or any conviction under the laws of any state resulting from conduct constituting an offense subject to this Plea Agreement; and

(iii) does not engage in any other conduct that would warrant his removal from the United States under the Immigration and Nationality Act.

The defendant understands that should the Antitrust Division become aware that the defendant has violated any of these conditions, the Antitrust Division will notify DHS. DHS will then determine, in consultation with the Antitrust Division, whether to rescind this agreement not to seek to remove the defendant.

(e) The defendant agrees to notify the Assistant Attorney General of the Antitrust Division should the defendant be convicted of any other felony under the laws of the United States or of any state.

(f) Should the United States rescind this agreement not to seek to remove the defendant because of the defendant's violation of a condition of this Plea Agreement, the defendant irrevocably waives his right to contest his removal from the United States under the Immigration and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his right to notice of removal proceedings.]

[16. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea

Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.]]⁴²

REPRESENTATION BY COUNSEL

17. The defendant has reviewed all legal and factual aspects of this case with his attorney and is fully satisfied with his attorney’s legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

18. The defendant’s decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

⁴² *Optional paragraph where administrative actions are a possibility.*

VIOLATION OF PLEA AGREEMENT

19. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations period for such offense shall be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

20. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding

the protections of Fed. R. Evid. 410.

[21.⁴³ The defendant agrees to and adopts as his own the factual statement contained in Paragraph 4 above. In the event that the defendant breaches the Plea Agreement, the defendant agrees that the Plea Agreement, including the factual statement contained in Paragraph 4 above, provides a sufficient basis for any possible future extradition request that may be made for his return to the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment. The defendant further agrees not to oppose or contest any request for extradition by the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment.]

ENTIRETY OF AGREEMENT

22. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge[s] in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

23. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

⁴³ *Insert Paragraph 21 if defendant is a foreign national. If it is not the standard practice in the filing district to have the factual basis included in the Plea Agreement, the factual basis may be attached to the Plea Agreement. See “Negotiating The Waters” at § IV(C), p. 17-18 for a discussion of Division policy regarding extradition of foreign nationals.*

[24. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED: _____ Respectfully submitted,

BY: _____
[JOHN R. DOE]
Defendant

BY: _____
[STAFF]

[NAME OF COUNSEL]
Counsel for [John R. Doe]

Attorneys
U.S. Department of Justice
Antitrust Division
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
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